IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO.8939 OF 2005

Shri Janak Devidas .. ..Petitioner
Versus
Pravinchandra Modi & Ors. .. ..Respondents

Mr. A.V.Anturkar with Mr.Sugandh B. Deshmukh for petitioner

Mr.P.K.Dhakephalkar with J.S.Chandnani for respondent

CORAM : P.V.KAKADE, J.

DATE : 24TH JANUARY 2006.

P.C.:

1. Heard the learned counsel for both the parties. Perused the record.

2. This petition under Article 227 of the Constitution of India is preferred by the aggrieved defendant against the order passed by the lower appellate court dated 28.9.2005 dismissing his appeal as well as Interim Notice No.2226 of 2005 and confirming the judgment and order passed by the trial court decreeing the suit for eviction, possession and recovery of arrears

of rent against him.

3. The plaintiffs-respondents being the trustees of "Bhagwandevi and Chirangilal Trust" are the owners of the suit building known as Goenka House situated at Walkeshwar Road, Mumbai. The defendant prior to the termination of his tenancy was the tenant in respect of a block situated on the first floor of the said Goenka House which was consist of the suit premises, on monthly rent of Rs.231/=. The plaintiffs by notice dated 15.4.1987 terminated his tenancy, which was duly served on the defendant. It was the case of the plaintiffs that the defendant was not paying the rent regularly as and when it became due and he is in arrears of monthly rent and permitted increases for the period from 1.10.1985 to 31.12.1989 @ Rs.200/= per month Rs.10,200/-, area tax from 1.4.1983 till 31.12.1989 @ Rs.13/= p.m. Rs.1,053 and repair cess due from 4.1.1087 to 31.12.1989 @ Rs.18/= p.m. Rs.648/=. Therefore, the plaintiffs by notice dated 21.4.1989 addressed to the defendant and copy sent to his advocate by Registered Post and copy also sent under certificate of posting, demanded the rent under Section 12(2) of the Bombay Rent Act. The said notice came back with postal remark "refused". A copy sent to

the advocate was received by him. The defendant however, did not reply to the said notice nor paid the rent demanded in the said notice.

4. By another notice dated 15.4.1987 tenancy of the defendant was terminated and by notice dated 21.4.1989 the plaintiffs demanded the rent. Till the filing of the suit the defendant did not pay the rent and therefore, suit for recovery of vacant and peaceful possession of the premises.

5. The defendant contested the suit, inter alia, denying the allegations made by the plaintiffs and challenged the maintainability of the suit on various grounds. It was the stance taken up by the petitioner-defendant that he was always ready and willing to pay the rent in respect of the suit premises. The defendant had also filed R.A.D.Suit No.629/3882 of 1971 and obtained decree against one Chiranjilal Goenka who was then the only owner of the suit premises, but the owner did not issue the rent receipts in the name of the defendant. The landlord, however, used to accept the rent from the defendant, sometimes by cheques and some times by money orders without passing rent receipts. It

is the defence sought to be made out on behalf of the defendant that sometimes in the year 1978 his way to the garage was obstructed and another suit came to be filed for declaration that the defendant was tenant in respect of the garage on the ground floor of suit premises.

. The said Chiranjilal Goenka expired during the pendency of the suit and therefore, his heirs were brought on record.

. It is the case of the defendant that he sent arrears of rent by way of two cheques of Rs.778.56 ps. and Rs.259.58 ps. to one Radheshyam Chiranjilal Goenka, but both the cheques were returned back to him with letter dated 25.1.1989. According to him, he sent the rent before he received the demand notice under Section 12(2) of the Bombay Rent Act and showed his readiness and willingness to pay the arrears of rent. However, the plaintiffs were not ready to accept the rent. On such and other grounds the suit was sought to be dismissed.

6. In the trial, before issues were framed, the Plaintiffs taken out Int. Notice No.2754 of 1996 on 7/6/1996 for directions to the defendant to deposit the

arrears of rent and compensation amounting to Rs.58,678.79 ps. upto 31.3.1996 and further ordering the defendant to go on depositing monthly compensation and repair-cess from 1.4.1996 till the disposal of the suit. After hearing both the parties, the learned trial judge by order dated 27.7.2000 while disposing the notice directed the defendant to pay all the sums as disclosed in prayer clauses of that notice. However, the defendant failed to deposit the said amount within the stipulated time or even thereafter, and therefore, the trial court passed order for striking out the defence of the defendant. The defendant did not prefer any appeal or revision against the said order. Thus the learned trial judge allowed the plaintiffs to lead evidence and also allowed the defendant to cross examine the witnesses examined by the plaintiffs. Thereafter on perusal of the oral and documentary evidence on record and hearing the parties decree came to be passed by the trial court.

7. The appeal was carried to the appellate court, who after hearing both the parties and on the basis of available evidence came to the conclusion that the trial court had appreciated the evidence in proper perspective and had recorded the findings legally and correctly and

as such appeal came to be dismissed. Hence the present Petition.

8. At the outset, it may be noted that on perusal of the judgments of both the courts below, it is quite apparent that both the courts have appreciated the evidence in proper perspective and have reached the conclusions, which are found to be just, legal and proper and therefore, would brook no interference. If we take into account the scope of Article 227 of the Constitution of India, it is needless to mention that re-appreciation of evidence is not at all contemplated under the supervisory writ jurisdiction of this Court. What is seen from the judgments of both the courts below is that both the courts, while recording the concurrent findings on the only issue involved that is, as contemplated under Section 12 of the Bombay Rent Act, have taken into account all facets of the evidence and have reached the correct conclusions and therefore, I hold that the petition is devoid of any merits.

9. The learned counsel for the petitioner vehemently urged that it was gross illegality on the part of both the courts below to ignore the fact that the defendant

was not allowed to enter into his defence in order to rebut the evidence of the plaintiffs-respondents. In this regard we must give attention to the order passed by the trial court on 27.7.2000 in Int. Notice No.2754 of 1996, which is self-explanatory. The trial judge has recorded that the several chances were given to the defendant, but no reply was filed by him in the said notice. It appears that the defendant was not seriously interested in the notice and therefore, the learned trial judge had no alternative but to pass an interim order. The order came to be passed to the effect that the defendant was directed to pay all the sums as mentioned in prayer clauses (a) (b) and (c) of the said notice on or before 31st August. Further the petitioner-defendant was directed to pay the monthly rent in respect of the suit premises at the rate of Rs.231/= till the current month on or before 31st August 2000 and thereafter shall pay regularly and punctually the monthly rent at the same rate on or before 10th day of each commencing month. The amounts which were already paid were directed to be adjusted.

. It was further directed that in the event the defendant does not comply with the said order within the

stipulated period his defence shall stand struck off.

. Now the entire controversy revolves around this clause. The learned counsel for the petitioner vehemently urged that the said order directing the defendant to pay the rent amount and striking off defence, if not complied with could not be passed. In other words, no in-built conditional order could be passed under law and as such the entire trial is rendered illegal. I prefer to disagree with this proposition. If we take into account the provision of Section 11(4) of the Bombay Rent, which reads thus -

> "11(4). Where at any stage of a suit for recovery of rent, whether with or without a claim for possession of the premises, the Court is satisfied that the tenant is withholding the rent on the ground that the rent is excessive and standard rent should be fixed, the court shall and in any other case if it appears to the court that it is just and proper to make such an order the court may, make an order directing the tenant to deposit in court forthwith such amount of the rent as the Court considers to be reasonably due

> to the landlord, or at the option of the tenant an order directing him to pay to the landlord such amount thereof as the court may specify. The court may further make an order directing the tenant to deposit in Court periodically, such amount as it considers proper as interim standard rent or at the option of the tenant an order to pay to the landlord such amount thereof as the court may specify, during the pendency of the suit. The court may also direct that if the tenant fails to comply with any order made as aforesaid, within such time as may be allowed by it, he shall not be entitled to appear in or defend the suit except with leave of the court, which leave may be granted subject to such terms and conditions as the Court may specify.

Therefore, it is quite clear, not only the trial court is within its right and is empowered to pass order such as the present one dated 27.7.2000 but is also empowered to issue direction if the defendant failed to comply with the order made under sub-Sec.4 of Section 11, within such time as may be allowed by it, defendant shall not be entitled to appear in or defend the suit except with

leave of the court, which leave may be granted subject to such terms and conditions as the court may specify. In the present case, it is an admitted but strange position that not only he did not comply with the interim order, but has also not taken any steps either to get the said order set aside by the same court, but also did not pursue independent remedy to get the order set aside from the superior forum, inspite of the fact that he had full and express knowledge of the order passed that non compliance would amount to striking off his defence. It is further revealed from the record that the learned trial judge, though did not allow him to put forth his defence, indeed allowed him to cross examine the plaintiffs' witnesses and to that extent leave, as contemplated under sub-Sec. 4 of Section 11 of the Act, was granted to appear in the suit in order to rebut the evidence of the plaintiffs. Under such situation, it cannot lie in the mouth of the petitioner that any prejudice is caused to his cause by striking off his defence. If any prejudice is indeed caused, it is by his own doing and he cannot blame any other party for the same.

10. The learned counsel for the respondents sought to

put reliance on the Apex Aourt ruling in the case of **M/s. Paradise Industrial Corpn. vs. M/s Kiln Plastics Products reported in (1976) 1 SCC 91**, wherein the Apex Court has observed that the phrase "defence struck off" or "defence struck out" is not unknown in the sphere of law. Indeed it finds a place in Order XI, Rule 21 of the Code of Civil Procedure. In effect, it carries the same meaning as the phrase carries in Section 11(4) of the Bombay Rent Act. It is further observed that even when a defence is struck off the defendant is entitled to appear, cross examine the plaintiff’s witnesses and submit that even on the basis of the evidence on behalf of the plaintiff a decree cannot be passed against him, whereas if it is ordered in accordance with Section 11(4) that he shall not be entitled to appear in or defend the suit except with the leave of the Court he is placed at a greater disadvantage. The use of the words "defence struck off" does not in any way affect the substance of the order. The order squarely fails within Section 11(4). What the law contemplates is not adoption or use of a formula; it looks at the substance. The order is not therefore one without jurisdiction. It is one which the judge was competent to make. In view of this position, there is no doubt whatsoever that the order of

striking off defence and the consequences which have followed appears to be, in the present case, perfectly legal and logical for which no grievance can be made, as the petitioner-defendant is himself to be blamed when he did not comply with the order of the court, which became final because he did not take any steps to get it set aside, as can be seen from the record.

11. Once we reach this position, there is no doubt whatsoever that the finding of facts concurrently recorded by both the courts below are, as noted earlier, found to be legal and proper and therefore, no interference is required in the present case.

12. In the result the petition is devoid of any merits and therefore, stands dismissed.

13. At this stage the learned counsel for the petitioner sought Stay of the order. In view of the facts and circumstances the order stands Stayed till 12th June, 2006.